of a statute and decisions upon it, but entirely of decisions, relied upon by the parties.

The rule in *Gelpcke* v. *Dubuque*[16] has been adopted by some of the State courts,[21] but rejected by others.[22] Its extension in *Muhlker* v. *Harlem R. R. Co.*[19] has received some support in late State court decisions. The first of three North Carolina decisions refused to allow a person accused of crime to be prejudiced by the retroaction of an overruling decision;[23] the second, without reference to the statutory construction exception, similarly protected contract rights;[24] the last, however, made in the present year, characterized the first two as isolated exceptions made in cases of special hardship and returned to an adherence to the orthodox theory as qualified by the statutory construction exception.[25] On the other hand, a recent Pennsylvania case, involving a mortgagee who had taken a mortgage on the faith of earlier judicial rules of construction of wills, *Hood* v. *Society to Protect Children* (Pa. 1908) 70 Atl. 845, while admitting that on principle decisions must retroact, refuses to apply the principle so as to prejudice the rights of the mortgagee, on the ground that the intention of the testator should not be defeated by a subsequent change of decision—the most extreme instance of the tendency to deny the orthodox theory of the common law.

It would seem that the reasons of justice, convenience, and sound business policy which have led the courts to breach the fictitious Blackstone theory with exceptions, might well justify them in consistently repudiating it, to the extent at least of guaranteeing to persons who have acquired property and contract rights in reliance on authoritative decisions of the highest courts, the same security against the retroaction of an overruling decision as they at present enjoy in the case of a repealing statute.

THE ELEVENTH AMENDMENT AND STATE OWNERSHIP.—In a recent case, *Murray* v. *Distilling Co.* (1908) 164 Fed. 1, in the Circuit Court of Appeals, the theory was enunciated that, if a State undertakes a private business, it is not entitled to the protection of the Eleventh Amendment in suits on obligations incurred in that business. The doctrine that a sovereign so engaged is not exempt has been judicially suggested,[1] but never decided. It was strongly urged in *The Parlemente Belge*[2] that the English courts might render a decree against a vessel owned by the King of Belgium carrying on a private business, but the court found the vessel was performing a public function. Chief Justice Marshall apparently decided *United States Bank* v. *Planters' Bank*[3] on the ground that. "when a government becomes the partner in any trading company, it divests itself, so far as concerns the transactions of that company of its sovereign character and takes that of a private citizen." But the case is usually construed to stand for no more than that a suit against a corporation is not one against the stockholder and therefore not one against the State

[21]Ray *v.* Natural Gas Co. (1890) 138 Penn. St. 576; Falconer *v.* Simmons (1902) 51 W. Va. 172; Farrior *v.* New Eng. etc. Co. (1891) 92 Ala. 176.
[22]Storrie *v.* Cortes (1896) 90 Tex. 283.
[23]State *v.* Bell (1904) 136 N. C. 674.
[24]Hill *v.* Brown (1907) 144 N. C. 117.
[25]Mason *v.* Nelson (N. C. 1908) 62 S. E. 625.

[1]In the Matter of Charkieh (1873) L. R. 8 Q. B. 197.
[2](1880) L. R. 5 Prob. Div. 197.
[3](1824) 9 Wheat. 904.

which owns the stock.[4] The Supreme Court has, however, decided that a State may act in two capacities, public and private, in holding that the Federal government could tax liquor sold by a State which had undertaken its sale for profit.[5] The underlying reason for this decision was the possible danger to the resources of the Federal government if the States could manufacture or import subject to no internal revenue taxes or customs duties. It is conceivable, therefore, that the doctrine of dual capacity, developed at length, might not be extended beyond the necessities of taxation, although no limitation was suggested in this case. The dual capacity of a municipal corporation seems a pertinent analogy—though its appositeness has been disputed[6]—illustrating that an instrument of government may have both public and private functions. Municipal corporations, whatever may have been their origin in England, were established in this country as agencies for local self-government.[7] According to the now accepted doctrine, a State of the Union is merely an instrument of the sovereign people of the United States clothed with some attributes of sovereignty, for the government of its citizens.[8] It might equally be considered suable, when acting for private purposes of gain. As a practical matter, the application of the doctrine of dual capacity to suits against a State would present a formidable obstacle to impetuous experimentation in public ownership and might well appeal to one opposed to socialistic legislation.

Such an application is not, however, entirely free from objection. The Eleventh Amendment in terms is sweeping. To this may be answered that the framers had in mind only a state in its public capacity. On the other hand, it is important to note that the immediate occasion for the enactment of the Amendment was the fear of the bankruptcy of states heavily in debt,[9] and that the very end sought to be avoided, might be accomplished by the enforcement of contracts of a private nature. Apart from the remoteness of such a possibility it may be said that the State is under no duty to its citizens to engage in business for profit and is not entitled to the same consideration as when for public purposes it has fallen into debt. The recognition of the suability of a State in cases involving a private business does not necessarily involve a conflict with the conception of the police power. The general criterion, in cases of municipal corporations, of the nature of the business, is whether the power to undertake a given business was granted by the legislature primarily for the purpose of profit to the corporation or for the performance of a governmental function.[10] Whether a State primarily enters a particular field for the former purpose or not, is indicated in *South Carolina* v. *U. S.*,[5] to be the test to determine which function is being performed. A business undertaken for profit, has, of course, no reference to the health, morals or welfare of the people, and it would seem immaterial that incidentally the welfare of the people might be affected. The recognition of this conception

[4]Briscoe *v.* Bank of Kentucky (1837) 11 Pet. 257.
[5]So. Car. *v.* U. S. (1905) 199 U. S. 437.
[6]*Per* White, J., dissenting in So. Car. *v.* U. S. *supra.*
[7]Dillon, Mun. Corp. 9, 27.
[8]7 COLUMBIA LAW REVIEW 611; Pomeroy, Const. Law 43.
[9]Cohens *v.* Virginia (1821) 6 Wheat. 264, 406; 8 COLUMBIA LAW REVIEW 182.
[10]Maxmillian *v.* The Mayor (1875) 62 N. Y. 160; Oliver *v.* Worcester (1869) 102 Mass. 489.

of the private capacity of a state in suits against it, is subject, therefore, to no serious objection and would accord with early dicta and the theory developed in *South Carolina* v. *U. S.*[5]

In the principal case the jurisdiction of the Federal court was supported in a proceeding against the members of a State Dispensary Commission appointed under statute to investigate and determine the validity of claims and to wind up the affairs of the State Dispensary. The court did not authoritatively adopt the doctrine of the dual aspect of a State, but found it sufficient to hold that the statute created a trust in the nature of an assignment for the benefit of creditors and that therefore the suit was not against the State. Assuming the court's contention that it was not bound under the circumstances to follow the decision of the State court given after the lower Federal court had taken jurisdiction, and that a trust was created, jurisdiction was rightly maintained.[11] That the enforcement of the State's contract is the incidental result of the suit is not an objection since the State expressed its willingness to be bound,[12] and the rule that an agent of the State cannot be controlled in the exercise of his discretion is not applicable, for a trustee can hardly be said to be the agent of the settlor of a trust. Nor can the case be brought within the rule refusing to control the property of the State or its use,[13] for the Legislature has relinquished all interest in the fund except in the ultimate balance, a mere equitable claim against the trustees somewhat analogous to the claim of the State to the profits of a corporation in which it is a stockholder.[14] The refusal of the court to follow the State decision[15] is, however, not clearly supportable in the light of the present state of the law on that subject. It has been held that the Supreme Court will follow a State decision interpreting a State statute though the lower Federal court had previously taken jurisdiction.[16] Language in *Burgess* v. *Seligman*[17] might seem opposed to this view, but the case has been construed to apply only where transactions have been entered into upon the face of the obvious interpretation of the statute.[18] And if the statute is ambiguous, the higher courts will follow an intervening State court decision.[19] Unless the Supreme Court is prepared to overrule *Moores* v. *Natl. Bank*[16] and the cases in line therewith, it will be forced on appeal to decide whether a State acting in a private capacity is within the protection of the Eleventh Amendment. For if no trust were created it would be beyond the power of the Federal court to control the officers in the exercise of discretion vested in them and to thus dispose of the State's property.[20] Moreover, it is questionable whether the statute clearly shows an intention to create a trust. A mere appropriation of money for a particular purpose is not conclusive,[21] and, in view of the particular circum-

[11]Chaffraix *v.* Board of Liquidation (1882) 10 Fed. 638; Board of Liquidation *v.* McComb (1875) 92 U. S. 531, as interpreted by La. *v.* Jumel (1882) 107 U. S. 711.
[12]Gunter *v.* Atlantic Coast Line (1906) 200 U. S. 273, 284.
[13]7 COLUMBIA LAW REVIEW 609.
[14]Bank of Ky. *v.* Worcester (1829) 2 Pet. 318; Pennoyer *v.* McConnaughy (1891) 140 U. S. 1.
[15]State *v.* Dispensary Comm. (1907) 79 S. C. 316
[16]Moores *v.* Nat'l Bank (1881) 104 U. S. 625; Oaks *v.* Mase (1896) 165 U. S. 363.
[17](1882) 107 U. S. 20.
[18]Bolles *v.* Brimfield (1886) 120 U. S. 759.
[19]Sanford *v.* Poe (1895) 37 U. S. App. 378.
[20]Decatur *v.* Spaulding (1840) 14 Pet. 497.
[21]Board of Public Works *v.* Jaunt (1882) 76 Va. 455.

stances surrounding the legislation, there is at least enough to be said for the view of the State court to prove the statute ambiguous, in which case the Supreme Court will exert itself to follow the interpretation of that court.

ASSESSMENTS UPON THE STATUTORY LIABILITY OF A NON-RESIDENT STOCKHOLDER.—Ch. 272, p. 315, Gen. Laws of Minn. of 1899, provides that in a receivership proceeding, if it appears that the assets of a corporation are insufficient to pay its debts, the court shall levy an assessment upon the statutory liability of all stockholders, and authorizes the receiver to prosecute actions therefor, whether a stockholder be within or without the state. Acting in pursuance of this statute, one Converse, the receiver of a bankrupt Minnesota corporation, brought suits against non-resident stockholders in the Wisconsin, Massachusetts and Federal courts, in all of which it was urged, among other defenses, that, not having been parties to the proceedings, no liability for the assessments there levied could ensue. This contention, founded upon the familiar doctrine that in an action upon a money demand, a personal judgment is without validity if rendered against a non-resident who did not appear, and upon whom no personal service of process within the State was made,[1] was adopted by the Supreme Court of Wisconsin in *Hunt* v. *Whewell*,[2] and has been followed in two recent decisions of the same court. *Converse* v. *Hamilton* (Wis. 1908) 118 N. W. 190; *Converse* v. *McCauley* (Wis. 1908) 118 N. W. 192. A contrary result has been reached by the courts of Massachusetts[3] and the United States,[4] following earlier decisions in New York,[5] and Massachusetts[6] with respect to a similar Washington enactment.[7] Although recognizing the doctrine of *Pennoyer* v. *Neff*,[1] the cases last mentioned deny, and with what appears to be the sounder reasoning, its applicability to proceedings of the character provided for by the laws in question.

Since legislation can have no effect beyond the limits of the State enacting it, one State can not impose a purely statutory liability upon stockholders resident in another State. But, inasmuch as the law is justified in assuming that a stockholder agrees to the provisions of the statute, according to which alone the corporation may contract, it is generally held—though courts have not been wholly consistent[8]—that one who takes stock impliedly undertakes liability to creditors as the statute directs.[9] As frequently stated, the liability is statutory in origin, but contractual in its nature.[10] Thus a cause of action upon this obligation is transitory.[11] The right of the legislature to increase his liability is denied by the constitutional provision against impairment of contract; the right to alter the procedure by which the liability may be made effectual is limited only by the "due process" clause.[4] Where a statute such as that of Minnesota is in existence when

[1]D'Arcy *v.* Ketchum (1850) 11 How. 165; Pennoyer *v.* Neff (1877) 95 U. S. 714.
[2](1904) 122 Wis. 33.
[3]Converse *v.* Ayer (1908) 197 Mass. 443.
[4]Bernheimer *v.* Converse (1907) 206 U. S. 516.
[5]Howarth *v.* Angle (1900) 162 N. Y. 179.
[6]Howarth *v.* Lombard (1900) 175 Mass. 570.
[7]1 Wash. Code §1511.
[8]The inconsistency appears only where the particular Statute of Limitations applicable is in question. McClaine *v.* Rankin (1905) 197 U. S. 154.
[9]Flash *v.* Conn (1883) 109 U. S. 371; Matteson *v.* Dent (1900) 176 U. S. 520.
[10]See 7 COLUMBIA LAW REVIEW 421, and cases cited.
[11]Whitman *v.* Bank (1900) 175 U. S. 559.